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PROSECUTING WOMEN FOR WELFARE FRAUD IN ONTARIO: IMPLICATIONS FOR EQUALITY

ERRLEE CARRUTHERS*

RÉSUMÉ

L'obsession grandissante de la part du gouvernement et de la population en ce qui a trait à la réduction du déficit et aux restrictions fiscales a eu pour effet d'étiqueter et de cibler une certaine partie de la population comme la cause des augmentations en spirale des coûts. Parmi les cibles, on compte les «fraudeurs de l'aide sociale». En 1994, l'ancien gouvernement de l'Ontario avait annoncé des mesures visant à intensifier la lutte contre les fraudeurs de l'aide sociale et il est clair que l'actuel gouvernement va donner suite à ces mesures si ce n'est les accroître. Cet article décrit les mesures actuellement utilisées pour détecter et poursuivre les fraudeurs du réseau d'aide sociale et il démontre comment ces mesures ont des effets disproportionnés sur les femmes. Ainsi, cet article tente d'inscrire les fraudes de l'aide sociale dans un contexte qui identifie la nature de ces poursuites selon l'identité sexuelle et fait part des possibles contestations relatives à l'égalité dans ce domaine.

1. INTRODUCTION

The "welfare cheater" does not present a genderless face to the public. The problems of abuse and overuse perceived to exist in the system are increasingly being blamed on the large number of single mothers who can't seem to find a man or, in his stead, a job. This paper will examine the gendered nature of the welfare system in the particular context of welfare fraud to determine what implications these perceptions have for the prosecution of this offence. The purpose of this examination is to develop a context in which one might begin to develop an argument that the methods by which this offence is prosecuted constitute a violation of the equality rights found in s. 15 of the *Charter*,¹ in that they disparately impact women. This paper will not attempt to delineate the legal

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1. *Canadian Charter of Rights and Freedoms*, s. 33 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 [hereinafter *Charter*].

arguments for such a claim, but will rather attempt to provide the background and analysis necessary to support it.

2. WELFARE FRAUD

2.1 *The Offence*

An offence of welfare fraud can be prosecuted through either the *Provincial Offences Act*² or the *Criminal Code*.³ With respect to the former, both the *General Welfare Assistance Act*⁴ and the *Family Benefits Act*⁵ make it an offence to "knowingly obtain or receive assistance" that one is not "entitled" to under the *Act* or the *Regulations*, as well as to aid or abet another person to do so. In Ontario, however, these offence provisions are rarely, if ever used. The *Transitions Report*⁶ of the Social Assistance Review Committee claims that this is because of the difficulty of investigating fraud allegations within the six month limitation period provided for under the *Provincial Offences Act*, as well as the inability of a judge to order restitution or compensation under the legislation.⁷ However, Dianne Martin disputes this claim, stating that both police and prosecutors cite the serious nature of the offence and the "leniency" of a provincial prosecution as reasons for proceeding under the *Code*.⁸

Prosecutions under the *Code* are brought under section 380(1), the general fraud section. The offence is defined as "defrauding the public or any person, whether ascertained or not, of any property, money or valuable security" by "deceit, falsehood or other fraudulent means."

2. *R.S.O. 1990 C-33*

3. *R.S.O. 1985 C. C-46* [hereafter the *Code*].

4. *General Welfare Assistance Act*, R.S.O. 1990, c. G,6, s. 16 [hereinafter *General Welfare Act*].

5. *Family Benefits Act*, R.S.O. 1990, c. F2, s.19, [hereinafter the *Family Benefits Act*].

6. Ontario, *Report of the Social Assistance Review Committee: Transitions* (Toronto: Queen's Printer, 13 May, 1988) [hereinafter *Transitions*].

7. *Transitions* at 383; See also Social Assistance Review Committee, *Transitions, The Interaction of Criminal Law and the Income Maintenance System in Ontario* (Background Paper) by A.M. Gutierrez (May 1987) at 20-21.

8. D. Martin, "Passing the Buck: Prosecution of Welfare Fraud; Preservation of Stereotypes" (1992) 12 *Windsor Yearbook Access to Justice* 52 at 75-77; she also points to Eligibility Review Officer's policy manual which states that "The P.O.A. is restricted to atypical cases and in reaching his decision to proceed under the P.O.A., the Area Manager will consider, among other factors: the seriousness of the offence. ..."

A leading case on fraud, *R. v. Olan, Hudson and Hartnett* has held that the two essential elements of the actus reus of fraud are "dishonesty" and "deprivation."⁹ Regarding the first element, the court has held that a failure to disclose changed circumstances in the context of social assistance amounts to dishonesty.¹⁰ The second element poses some interesting questions for social assistance. If the accused would have been eligible to the benefits in any case, under general welfare rather than family benefits, for example, can there be said to be a deprivation? Two recent cases have indicated that there may not.¹¹

R. v. Theroux has held that the issue for the mens rea of fraud is "whether the accused intentionally committed the prohibited acts ... knowing or desiring the consequences proscribed by the offence. ..." ¹² The mens rea for fraud is complex and a detailed examination is beyond the scope of this paper. However, the issue of mens rea can be especially significant in social assistance law, as when an accused does not know that the information she failed to provide could have affected her eligibility (a common occurrence given the complexities of social assistance legislation.). For example, if she did not know her partner was a "spouse" for the purposes of the *General Welfare Act*, can failure to disclose the relationship be said to be intentional dishonesty? Brodsky and Greene argue that this type of scenario constitutes a negation of the mens rea for fraud, rather than a mistake of law, and is thus not caught by s. 19 of the *Code*, which disallows a mistake of law defence.¹³

It is important to keep in mind, however, that the above offence provisions are not definitive as to what is understood by the concept of "welfare fraud." There is a broad continuum of what is perceived as constituting fraud, ranging from systematic and flagrant abuses of the system, to failure to report babysitting money, or gifts from friends. Is an overpayment due to client error fraud? Although it would not be an offence, many include it with criminal fraud under the general category of abuse. This can have a significant effect on estimations of the incidence and frequency of fraud, as well as on public perceptions of the

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9. (1978), 41 C.C.C. (2d) 145 at 149 (S.C.C.). This was reiterated more recently in *R. v. Theroux* (1993), 79 C.C.C. (3d) 449 at 460 [hereinafter *Theroux*].
 10. *R. v. Monkman* (1980), 4 Man. R. (2d) 352; *R. v. Parise*, [1994] N.B.J. No. 401 (QL) [hereinafter *Parise*].
 11. *Parise*, supra, note 6 at paras. 38-39; *R. v. Lalonde*, [1995] O.J. No. 160 (QL) at para. 41 [hereinafter *Lalonde*].
 12. *Supra*, note 6 at 456.
 13. D. Brodsky & M. Greene, "The Mental Element/Mens Rea of Social Assistance Fraud" (Paper presented to Department of Continuing Legal Education, The Law Society of Upper Canada, 25 March 1995) [unpublished] at D-15.

system.¹⁴ Both Martin and Gutierrez recognize the importance of insisting on intentionality, that is deceiving for the purpose of obtaining a benefit one is not entitled to, in any definition of fraud.¹⁵

2.2 *The Investigation*

The process of moving from a suspected fraud to the formal laying of a charge by the Crown Attorney can be degrading, invasive and frightening for the alleged offender.¹⁶ Suspicions can arise from a variety of sources, with a large portion coming from anonymous hotline phone tips. Every one of these calls must be investigated by the caseworker unless it is clearly spurious, as where the caller has engaged in a practice of harassing the recipient, or the actions complained of are not prohibited by the legislation.¹⁷ These "snitch" lines set up a form of community policing of welfare recipients, creating a "class of *prima facie* suspect people ... whose activities warrant continual scrutiny. ..." ¹⁸

A front line worker may investigate a complaint by either "interviewing" the client or by questioning others such as family, neighbours, and employers before confronting the client. The latter method is used to prevent the client from "covering up" the fraud.¹⁹ However, it is also highly invasive and can seriously affect a recipient's relationships, especially in situations where they have chosen to conceal the fact that they were on assistance. Once the worker feels that an intentional fraud has occurred, the matter is formally referred to an Eligibility Review Officer (E.R.O.), whose primary function is to investigate fraud. These officers have no status under social assistance legislation, and although in theory their actions are guided by a policy manual, in reality their practices vary dramatically across the province.²⁰ Their investigations are highly intrusive,

14. For a more detailed discussion, see Martin *supra*, note 4 at 82-86. As of yet, there do not appear to be any reliable statistics for the incidence of welfare fraud.

15. *Ibid.* at 84; Gutierrez, *supra*, note 3 at 11-13; *Transitions*, *supra*, note 3 at 383.

16. See K. Varma, *Welfare Fraud: An Analysis of Discretion in Creating a Case* (M.A. Thesis, Centre of Criminology, University of Toronto, 1994) [unpublished] for a case study of one welfare office's approach to the investigation of fraud.

17. *Ibid.* at 4-5.

18. M. Wilkie, *Women Social Security Offenders: Experiences of the Criminal Justice System in Western Australia*. at 48. In fact, advocates claim that this type of policing also causes great distrust among the recipient community, imposing obstacles to effective support networking.

19. Social Assistance Review Committee, *Transitions, Welfare Fraud and Overpayment*, (Background Paper) by Peat Marwick at 30.

20. Marwick, *supra*, note 15 at 31; I. Morrison, "Facts About Social Assistance Administration that Criminal Lawyers Ought to Know" (Paper presented to Department of Con-

especially where the suspicions are related to changes of circumstances in the family, such as when a child has run away, or a "spouse" is suspected of cohabiting with the recipient. According to Ian Morrison, some common problems which occur in investigations are, information mishandling, threats and harassments, failure to identify the purposes of the investigation, physical intimidation, and violation of privacy.²¹

There are several possible outcomes of an investigation. The E.R.O. or worker may feel that there is not sufficiently clear evidence of an intent to defraud, and so deal with the issue administratively. These measures can range from cut-offs to simply correcting the error with no repercussions, but the most common measure is the assessment of an overpayment which is then recouped by deductions from the recipient's entitlement.²² If the E.R.O. believes that there was an intent to defraud, then they may refer the matter to the police. As Kim Varma points out, the discretion given to the E.R.O. is of fundamental importance as it gives the officer complete power over whether or not the matter should be pursued criminally.²³ Thus, the fact that there is no clear policy governing the E.R.O.s' actions and that there are no statutory limits on the use of their discretion is extremely problematic.

2.3 *To Charge or not to Charge*

The decision on the part of the police whether to refer a case to the Crown, and the Crown's decision whether to prosecute are similarly marked by an enormous amount of discretion. Currently, all charges go through a screening process, where the Crown must review all charges to decide whether to proceed. There are no specific policies in place with respect to welfare fraud charges, but policies dealing with offences in general are applicable. The factors to be taken into account in screening are outlined in the *Crown Policy Manual*.²⁴ Two of the most significant factors are whether there is a "reasonable prospect" of

tinuing Legal Education, The Law Society of Upper Canada, 25 March 1995) at A-17.

21. Morrison, *supra*, note 16 at A-18-20. Gutierrez, *supra*, note 3 at 26 asks, "Where is the line to be drawn between observing the recipient and watching and besetting?"
22. Both Marwick, *supra*, note 15 at 29 and R. Hasson, "The Cruel War: Social Security Abuse in Canada" (1981) 3 Canadian Taxation 114 at 130 point to the frequent use of cut-offs as problematic, given the inadequate safeguards against arbitrariness in social assistance legislation.
23. Varma, *supra*, note 12 at 25. Also, Martin, *supra*, note 4 notes, at 62, that police will rarely investigate these allegations on their own initiative.
24. See J. D. Mackenzie, "The Screening Process: Application of the 'Public Interest Test'" (Paper presented to Department of Continuing Legal Education, The Law Society of Upper Canada, 25 March 1995) at B-1-B2 for a list of all of these factors.

conviction and if so, whether it is in the "public interest" to discontinue the prosecution.²⁵ With respect to the public interest, the manual provides a further list of factors to be taken into account, including the seriousness of the offence, the need to maintain public confidence in the administration of justice, the prevalence of the type of offence and any related need for deterrence, and whether the consequences of any resulting conviction would be unduly harsh or oppressive.²⁶ Clearly, these types of considerations allow subjective attitudes and perceptions about the nature and frequency of welfare fraud to influence decisions, despite the manual's directive that this is not to happen. As Martin states, "Attitudes steeped in scorn and presumption are not limited to the general public ... they influence administrators, prosecutors and judges as well."²⁷

2.4 *Pleas and Sentences*

The way in which a Crown exercises her discretion does not only affect whether a charge proceeds to trial, but can also have a significant impact on sentencing. The Crown's election to proceed by way of indictment or summarily has repercussions for the maximum penalties available, and it is the Crown who negotiates early guilty pleas with the accused, usually in return for a reduced sentence. Apart from a fine or imprisonment, the Crown may request a compensation order, which is enforced civilly, or, if probation is imposed, a restitution order, which is enforced criminally, as a breach of probation.

According to Dianne Martin, the "paramount" principle in sentencing welfare fraud offenders for the last 20 years is the principle of "general deterrence," which invariably results in imprisonment being sought by the Crown and frequently imposed by the Court.²⁸ Although there is also a concept "exceptional circumstances" as reasons for mitigating sentences, its use has been narrowly framed, and excludes consideration of both poverty and deprivation, often the very circumstances relevant to a welfare fraud offence.²⁹ This attitude is demonstrated by a leading sentencing case, *R. v. Thurotte*:

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25. According to Mackenzie, an Assistant Crown Attorney for Ontario, there is a presumption to prosecute in any case where there is a "reasonable prospect of success." According to him, "fraud is fraud" and where there are questions of such things as honest factual mistake, a genuine sense of necessity or duress, they should be raised at trial. One might wonder what the function of a pre-trial screening process is if Crown's do not consider these issues.
 26. See Mackenzie, *supra*, note 20 at B-3-B-5 for a complete list.
 27. Martin, *supra*, note 4 at 87.
 28. *Ibid.* at 66.
 29. D. L. Martin, "Sentencing in Welfare Fraud Cases: Making the 'Exceptional' More Likely" (Paper presented to Department of Continuing Legal Education, The Law Soci-

Although this case is pitiful in many respects, this Court is unanimously of the opinion that the paramount consideration in determining the sentence is the element of deterrence. Welfare authorities have enough difficulties without having to put up with persons who set out to defraud them.³⁰

In light of the current fears of rampant welfare abuse, which as noted above do have an effect on judges, the need for general deterrence is perceived as being high. Martin's examination of sentencing supports the conclusion that a "significant number" of cases resulted in sentences of imprisonment, although conclusive data were unavailable.³¹ In any case, the threat of prison always exists, and can influence an accused's willingness to enter into an early guilty plea, even though she might have a good chance at succeeding at trial.³²

2.5 Recent Government Initiatives – Enhanced Verification

On March 28, 1994, Social Services Minister Tony Silipo informed the Legislative Assembly of Ontario of plans to "step up the fight against welfare fraud."³³ In fact, the "crackdown" had begun in 1992, with the hiring of an additional 450 staff to monitor and investigate fraud, and the implementation of a new computer system in December 1993 to track fraud. The government defines this initiative, termed "Enhanced Verification" as a "comprehensive investigation of social assistance cases in order to reduce fraud, misrepresentation and error in the social assistance system."³⁴ The program consists of intensive investigations of social assistance cases by a new staff who review the eligibility of recipients, ensure that recipients are receiving the exact amount they are entitled to, verify the living arrangements of recipients and ensure that recipients are pursuing all other sources of income.³⁵

ety of Upper Canada, 25 March 1995) at G-3.

30. (1971), 5 C.C.C. (2d) 129 (Ont. C.A.) at 129. Ms. Thurotte received a 5 month sentence for defrauding welfare of \$1700.00.
31. Martin, *supra*, note 4 at 67. Of 50 cases of welfare fraud, jail was imposed in 80%, ranging from 30 to 60 days up to 9 to 12 months.
32. I. Morrison et al., "Poverty Law in Ontario: The Year in Review" (1994) 10 Journal of Law and Social Policy 1 at 15 [hereinafter "Review"] states that advocates are aware of people who plead guilty "to get it over with"; see also Martin, *supra*, note 4 at 65. S. Uglow puts the plea rate at 93% in "Defrauding the Public Purse: Prosecuting in Social Security, Revenue and Excise Cases," [1984] Crim. L. R. 128 at 131.
33. Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, (28 March 1994) at 5187.
34. Ministry of Community and Social Services, Social Assistance Programs Branch, *Casefile Investigation* (Briefing Package #1) (28 March 1994) [unpublished][hereinafter *Briefing Package*] at 1.
35. *Ibid.*

In order to assist in this process, the Ministry has developed a profiling system to identify "high-risk" cases which are to receive "priority verification."³⁶ In an interim report, the government claimed that the initiative saved \$66 million dollars from April to August 1994, and referred 1029 suspected fraud cases to local police, with numbers expected to increase.³⁷ Indeed, advocates in clinics have reported unprecedented increases in the number of fraud charges.³⁸ This campaign follows the typical pattern of what Dee Cook refers to as "fraud drives," consisting of the specific targeting of a claimant group or groups, a proactive rather than a reactive approach, and high profile publicity of the results of the drive. According to Cook, these drives perform an ideological function, as a means of "galvanizing comfortable public opinion against welfare recipients" to serve political objectives.³⁹ These political goals have severe repercussions on the lives of those targeted, lives which, by no coincidence, are some of the most vulnerable in our society—the poor and women.

3. WELFARE FRAUD AS A CLASS CRIME

It is not terribly insightful to state that welfare fraud is committed predominately by the poor. However, this fact is significant both for the public perception of and the legal response to the offence of welfare fraud, as well as to those charged with the offence and the recipients of social assistance in general.

3.1 *Public Perceptions*

The public perception of those who commit welfare fraud is closely linked to the public perception of those who are on welfare in the first place, what Marwick sees as the popular perception of the "welfare bum,"⁴⁰ and Dianne Martin refers to as the "stereotypical 'undeserving' welfare recipient, the lazy,

36. A case is considered to be high risk if at least 2 of the following 6 factors are present: missing or duplicate Social Insurance Numbers; duplicate phone numbers; five or more address changes in the past twelve months; presence of at least one dependent child 16 years or over; combined gross earnings of more than \$750 for single, and \$1000 for other; and shelter costs of 70% or more of total disposable income. *Memorandum re: Priority Verification* issued to Social Service Administrators by the Ministry of Community and Social Services, Social Assistance Programs Branch (27 March 1995).

37. *Managing Social Assistance in Ontario: Finding the Problems and Fixing Them* (Ontario: Ministry of Community and Social Services, October 1994) at 11. However, as Ian Morrison points out at A-5, the figure for fraud referrals really amounts to only 0.15% of the provincial caseload.

38. "Review", *supra*, note 28 at 15.

39. D. Cook, *Rich Law, Poor Law: Differential Responses to Tax and Supplementary Benefit Fraud*, (Milton Keynes: Open University Press, 1989) at 136-38.

40. Marwick, *supra*, note 15 at 63.

incompetent cheat who must be watched carefully because of her ever readiness to bilk the system."⁴¹ That the perception of welfare fraudsters is closely related to class bias is clearly shown in the differing public attitudes towards tax evasion. Steve Uglow writes:

The tax fraud is looked upon indulgently as a person is 'entitled' to retain what is his own. ... But the welfare claimant is often informed upon by his neighbours and has few defences since all the circumstances of his life may be under public scrutiny. The claimant may also carry a 'moral taint' as a person unable to earn a living.⁴²

Unlike other types of fraud, people see welfare fraud as a crime against themselves, as "honest taxpayers".⁴³

Media and politicians help fuel this class bias. For example, in Vancouver recently, there was a media blitz of welfare fraud stories. During that time, two cases of serious income tax evasion, one amounting to \$17.5 million, came to light and received little, if any, media attention.⁴⁴

The idea that welfare fraud is a more heinous and immoral crime than that of tax evasion directly contradicts their respective costs. The amount of money lost to tax evasion is far greater than what is lost to all social security frauds.⁴⁵

3.2 Different Treatment for Different Fraud

The negative stereotyping of welfare recipients has a significant impact not only on perceptions of welfare fraud, but on the actual treatment of it as well. These offenders face a much greater risk of prosecution, conviction and imprisonment than does a tax evader, where the emphasis is on settlement and administrative enforcement.⁴⁶ Dee Cook writes:

Because welfare recipients are 'takers', the state may lay down conditions upon which their benefit is to be received. The state thus has the power to punish those who cannot, or will not, meet those disciplinary criteria: benefits can be reduced or withdrawn, and in some circumstances individuals penalized for failing to maintain their families financially. By contrast, taxpayers are 'givers' to the state and the discipline to which they are subjected is less rigorous and

41. Martin, *supra*, note 4 at 86.

42. Uglow, *supra*, note 28 at 128.

43. R.W. Collin & W.M. Hemmons, "Equal Protection Problems With Welfare Fraud Prosecution" (1987) 33 Loyola L.R. 17 at 19.

44. J. Swanson, "Cheating the Poor" [1994] Canadian Forum 20.

45. Hasson, *supra*, note 18 at 115.

46. Uglow, *supra*, note 28 at 130.

less direct—as a result, attempts to enforce the Taxes Act frequently attract vociferous condemnation. ...⁴⁷

These perceptions allow politicians to gain political favour at the expense of a dispossessed group. Hasson describes this as a particular “cynical and cruel” war in which politicians exaggerate the extent of fraud to enable them to cut-back and commit abuses against recipients without sanction, discourage others from claiming benefits because of the accompanying stigma, and “conceal vast areas of welfare law and administration from critical scrutiny.”⁴⁸

4. WELFARE FRAUD AS A GENDERED CRIME

The negative stereotype of the “welfare cheat” is not gender neutral. With more and more frequency (and hostility) the image of the welfare cheat is that of the irresponsible single mother (often black) who refuses to get a man or a job to ensure a good home for her child. Martha Fineman refers to this as “the specter of single motherhood—statistically on the upswing—pathological and disease-like, contaminating society, contributing to its destruction and degeneration.”⁴⁹

Unfortunately, the reality behind these perceptions is that a large number of welfare recipients are women, and as a result “to some extent the crimes of recipients are the crimes of women. ...”⁵⁰ As with class, then, stereotypes and attitudes towards women and their role in society will impact on how welfare and welfare fraud are perceived and regulated.

4.1 *Women on Welfare*

The key concept underlying both the cause of women’s poverty and the regulation of their poverty through the welfare system is that of the family wage and its reliance on the ideology of the nuclear family.⁵¹ This model, where a man earns wages to support his “dependant” wife and child leads to forced dependence and results in unattached women assuming a far greater risk of being poor, and thus turning to welfare, than attached women.⁵² Linda Gordon writes: “For

47. Cook, *supra*, note 35 at 171.

48. Hasson, *supra*, note 18 at 147.

49. M. L. Fineman, “Images of Mothers in Poverty Discourses” [1991] *Duke Law J.* 274 at 287.

50. Gutierrez, *supra*, note 3 at 7. Martin, *supra*, note 4 at 89 found that out of 50 reported welfare cases across Canada, 38 involved women.

51. See J. Lewis, “Towards a Framework for Analyzing the Position of Women under Income Security Policies” in E. D. Pask, K. E. Mahoney & C. A. Brown, eds., *Women, the Law and the Economy* (Toronto: Butterworths, 1985) at 145 for a detailed discussion of the concept of the family wage.

52. A recent government report found that unattached women are the most vulnerable to

all women, black and white, the need for 'welfare' in industrial society arises primarily from the gap between the myth that women are supported by men and the reality that so many are not."⁵³ And so, "increasing numbers of women ... are living in poverty because of their inability to fulfil their role in the economic marriage of breadwinner-dependent, assumed to be the family norm. ..." ⁵⁴

Women on welfare, then, are seen as failures and deviants, having "strayed" from their proper role as dependent wife and mother. Further, women's role as mother leaves them open to criticism not only for ruining their own lives, but that of future generations as well. Thus, they are not only blamed for using welfare themselves, but for creating future users as well.⁵⁵ The media and politicians portray them as both "imprudent (bad managers) and breeders of undisciplined problem children."⁵⁶

These gender ideologies are reflected in the regulation of welfare. Where a woman on welfare lives with a man who is her spouse, the man is considered to be the head of the family and receives the cheque in his name. The particular danger with policies like this is that they not only reflect dominant ideologies, but they actively create and reinforce them, as here, where a woman has no choice but to go to her husband for financial support.

In relation to single women, welfare is designed to serve as their temporary provider and supervisor until they solve their "problem" by replacing the "missing male."⁵⁷ The government's developing emphasis on requiring women to establish paternity and seek support from the father of their children forces women to enter into a legal relationship of dependency with the man the state has determined should be her provider, a tie Martha Fineman sees as a substitute for the marriage bond.⁵⁸ Furthermore, women cannot receive family benefits if

poverty, and that 84% of all women can expect to spend a significant amount of their adult life without a male partner. They came to the conclusion that the best protection against poverty is a man's income. *Women and Poverty Revisited: A Report by the National Council of Welfare* (Ottawa: Queen's Printer, 1990).

53. L. Gordon, "What Does Welfare Regulate?" (1988) 55 *Social Research* 609 at 621.
54. D. Cook, "Women on Welfare: In Crime or Injustice?" in P. Carlen & A. Worrall, eds., *Gender, Crime and Justice* (Milton Keynes: Open University, 1987) 28 at 30 [hereinafter *Injustice*].
55. Fineman, *supra*, note 45 at 284, sees this as the new use of the culture of poverty theory, in which "single mothers are implicated in by their asserted role in the inter-generational transmission of poverty. ..."
56. *Injustice*, *supra*, note 50 at 30-31.
57. Fineman, *supra*, note 45 at 276.
58. *Ibid.* at 274.

they are found to be cohabiting with a "spouse." The state automatically assumes that he will support her and her children. Many feminist scholars see these policies as reproducing the demand of sexual exclusivity by a husband in return for economic support, which is then replaced when the woman finds another sexually exclusive partner.⁵⁹

The stereotypes and ideology reproduced in the welfare system is also reproduced within the context of welfare fraud. Owing to the state's interest in having women assume their proper role, women are subjected to highly invasive and degrading interrogations regarding their living situations and intimate relationships. Dee Cook claims that this "unequal and harsh treatment of lone mothers is justified as an indirect spur to 'solve' their problems by marrying." If women choose not to do so, then, Cook argues, they may frequently have to resort to welfare fraud to keep their financial security.⁶⁰

4.2 *Cohabitation Fraud*

One of the most flagrant examples of the reproduction of female dependency on men within the welfare system is the infamous "spouse in the house" rule, particularly where criminal sanctions are used as a means of enforcement. Under Regulation 366 of the *Family Benefits Act*, a person is ineligible if they are living with a "spouse," defined in the regulations as a person who has a legal obligation to support the recipient or her children under the *Family Law Act*. Under this rule, then, if a woman wishes to maintain her financial independence as well as have a permanent relationship with a man, her only choice is to commit fraud.⁶¹

Cohabitation fraud is one of the most prevalent forms of welfare fraud in Ontario,⁶² and overwhelmingly, women are the ones charged with the offence, despite the fact that in most cases, the male partner is equally, if not more, culpable.⁶³ As women are likely to be the ones claiming under the family benefit scheme (which generally provides a more generous entitlement than under general welfare), it is usually she who is initially investigated. However, as

59. See for example, M. Leighton, "Handmaid's Tales: Family Benefits Assistance and the Single-Mother-Led Family" 45 U.T. Fac. L. Rev. 325; and M.H. Little, "'Manhunts and bingo blabs': The moral regulation of Ontario single mothers" (1994) 19 *Canadian J of Sociology* 233.

60. Injustice, *supra*, note 50 at 32.

61. See Cook, *supra*, note 35 at 81.

62. E. Sabitini, K. Menzies & F. Evers, "Welfare Fraud: Cohabitation and the need hypothesis" (1992) *Canadian J of Sociology* 181 at 185.

63. Martin, *supra*, note 4 at 90-92. In her study, D. Martin found that of 16 cohabitation fraud cases, only 4 involved charges against the male partner. In one of these, the charges were dropped because of his "spouse's" guilty plea.

Dianne Martin points out, there is no reason why the focus should also remain solely on her in the criminal process. This pattern, she argues, "replicates and is arguably driven by the stereotype of the 'welfare mother'. Her feckless 'boyfriend' is mere evidence of her inadequacy."⁶⁴

The offence of cohabitation fraud is problematic for several reasons apart from the ideology which it perpetuates. By making a woman's sexual activities the subject of criminal sanctions, the policing of single mothers, both by the community and the social assistance administration, is especially intrusive. One recipient described it as "Big Brother" and another stated she felt she could not have a relationship: "You can't, because you don't know who's around the corner. It's just not worth it."⁶⁵

Furthermore, the rule does not require any proof of actual economic support, it is simply assumed once a partner is deemed a spouse.⁶⁶ Where the man is unwilling or unable to accept this responsibility, a woman is forced to choose between her benefits or her partner.

Finally, the determination of who is a "spouse" is a complex and unpredictable exercise, with a long history of judicial interpretation and confusion.⁶⁷ Although the regulations provide for a list of factors to be used in the determination, they allow for a great deal of subjectivity and arbitrariness. To further complicate matters, criminal courts may not be limited to these factors.⁶⁸ Thus, a woman may not know whether her partner is a "spouse" under the legislation, creating anxiety on her part over possible prosecution, as well as increasing the potential for erroneous prosecutions.⁶⁹ Because of these problems, some academics

64. *Ibid.* at 90.

65. Wilkie, *supra*, note 14 at 36, 48.

66. See *ibid.* at 41-42; G.F. Whyte, "Social Welfare Law - The Cohabitation Rule" (1991) 11 Dublin U. L.J. 187.

67. See Hasson, *supra*, note 18 at 128; S.A.M. Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminism, Lesbian and Gay Engagement to Law" (Paper prepared for University of Toronto's Feminism and the Law Workshop, 18 November 1992) [unpublished] at 24-32.

68. *R. v. Jantunen*, (14 March 1994), (Ont. Ct. Gen. Div.) [unreported] in which the court found that it could take the sexual relationship into account despite regulations to the contrary; this case is currently under appeal and has important ramifications for the degree of intrusiveness of fraud investigations.

69. Although it was argued above that in this scenario there is no *mens rea* for the offence of fraud, in many situations a recipient would be unaware of this defence and might therefore plead to a charge unnecessarily. Furthermore, it is pointed out in the "Review", *supra*, note 28 at 15 that many criminal defence lawyers are unaware of available defences and the intricacies of social assistance legislation.

recommend prosecuting only where economic support is actually proved, if at all.⁷⁰

4.3 *The Case of Domestic Violence*

From a feminist perspective, domestic violence is not seen as isolated incidences of conflict, but rather as "manifestations of the culturally-condoned oppression of all women in both the public and private spheres of ... society."⁷¹ Within this framework, then, the situation of the battered woman is the consequence of the ideology of dependence promoted in our society, a situation that is exacerbated with the welfare system. This exacerbation can occur in one of two ways. First, the welfare system's insistence that women depend upon male partners for financial support, as well as the inadequacy of the benefits provided by the system, makes it extremely difficult for a woman to acquire the resources necessary to leave an abusive relationship. The Federal Panel on Violence Against Women recognized the interaction between poverty and violence in their report:

The ferocious impact of violence on poor women is intensified because of the extra level of suffering; poverty is abusive in itself. ... Without [financial independence], the only option is to endure. ... Nor does social assistance provide enough financial security for a woman to leave, particularly if she has children to support. If a woman is abused, poverty even limits her ability to seek legal or medical redress.⁷²

Second, where a woman is involved with an abusive male in a possible cohabitation relationship under the *General Welfare Act*, the potential of prosecution gives him more power over her by threatening to turn her in to authorities.⁷³ This threat can be used to coerce her into continuing to fail to report his presence in the home, and leaves her no recourse if he uses the money for himself. Unfortunately, the courts have often refused to recognize the role that violence may play in this offence. In one unreported case of cohabitation fraud, a judge,

70. Wilkie, *supra*, note 14 at 44; See also J. Hughes, "Defence and Mitigation of Social Welfare Offences" [1987] *New Zealand L.J.* 192 at 193-6.

71. E., "Dependency, Control, and Isolation: Battered Women and the Welfare System" (1988) 16 *J. of Contemporary Ethnography* 469 at 469.

72. The Canadian Panel On Violence Against Women, *Changing the Landscape: Ending Violence, Achieving Equality* (Ottawa: Ministry of Supply and Services Canada, 1993) at 63.

73. With reference to abusive welfare fraud scenarios, one lawyer stated that: "These cases always start with men 'squealing' to the authorities about welfare fraud after the women try to leave them." S. Fine, "Battered Woman acquitted of fraud" *The [Toronto] Globe and Mail* (2 March 1995) A1, A4 at A4.

despite finding an abusive relationship, sentenced the accused to six months in jail, stating that the boyfriend "was certainly not standing over her shoulder at the Welfare Office" when she filled out the forms.⁷⁴

However, the recent case of *R. v. Lalonde* provides more hope for women in violent situations.⁷⁵ In this case, Justice Trainor allowed the use of the battered woman syndrome defence, first recognized by the Supreme Court of Canada in *R. v. Lavallee*,⁷⁶ and acquitted a woman charged with fraud arising from an abusive cohabitation situation. This appears to be the first time that a court has used the defence outside of a self-defence context. Justice Trainor noted that if Lalonde had reported the cohabitation and transferred to general welfare, she risked not getting the cheque in her name, and so not being able to protect her family. Seeing Ms. Lalonde's "reasonable perceptions" as the key issue, he found that, as a battered wife, "she had, in her mind, no reasonable alternative and putting the food on the table for her children, in her financial circumstances, was pressing."⁷⁷ The court found that the battered woman syndrome went to both the element of mens rea, and the defence of necessity.

In recognizing the particular dynamics and issues involved in the relationship between an abused woman, her abusive partner and a rigid social assistance system, Justice Trainor was able to focus on the real question at issue with fraud, namely was there an intent to deceive. Can there really be such an intent when a woman is either coerced into not disclosing, or forced to non-disclose in order to protect her family? A focus on intention may have broader implications as well. Martin argues that if it is unjust to prosecute in these situations, it is equally iniquitous to extend the punitive net in a system where there is so much scope for error as a result of highly complex (and changing) regulations."⁷⁸ Another promising avenue implicit in the *Lalonde* decision is the widening of the scope of the defence of necessity, perhaps even beyond the domestic violence situation given that the court acknowledged the pressing nature of ensuring that one's family is fed and protected.

However, the progressiveness of one judge, or even a new widening of defences, is not sufficient to address the problems encountered by women caught between a violent domestic situation and the welfare system. This is especially so in light of the prosecutorial practice to proceed with charges against women despite

74. Martin, *supra*, note 4 at 69.

75. *Supra*, note 7

76. (1990), 55 C.C.C. (3d) 97.

77. *Lalonde*, *supra*, note 7 at para. 37.

78. Martin, *supra*, note 4 at 88.

violent situations, and to disallow coercion or threat of violence as a defence.⁷⁹ As well, although current practice is usually not to refer such cases to the police, the Ministry of Community and Social Services is considering making its policies "consistent" with prosecutorial practice.⁸⁰

5. EQUALITY ISSUES

The body of this paper has provided the background and analysis necessary to demonstrate that the current methods of prosecution of welfare fraud constitute discrimination against women. The rest of this paper will begin to demonstrate how this analysis might fit into a s. 15 challenge, by providing an overview of current s. 15 jurisprudence and a synopsis of particular practices and policies, most of which have been described in some detail above, that could be open to a s. 15 challenge.

5.1 *Section 15 – Substantive Equality?*

S. 15(1) of the *Charter* reads:

Every individual is equal before and under the law and has the right to the equal protection of the law without discrimination, and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The jurisprudence under this section is still relatively young, and is continually developing. Two related debates still ongoing, both relevant to any claims that women may make in the context of welfare practices and policies, are first, whether the section promises formal or substantive equality and second, whether the section can be used to get at "unintentional" systemic discrimination.

The first debate seems relatively settled in favour of substantive equality. The leading case on s. 15, *Andrews v. Law Society of British Columbia*⁸¹ rejected the "similarly situated test," which only protected the formal equality ideal that all equals should be treated alike. According to Kathleen Mahoney, the similarly situated test "effectively works to obscure the systemic, historic, embedded, disadvantaged reality of women. ..." However, with a discrimination/disadvantage test, as was adopted in *Andrews*, "women's social subordination is recog-

79. Ontario Ministry of Community and Social Services, *Social Assistance and Family Violence Policy* (January 11 1995) [Draft] at 13.

80. *Ibid.* As well, the MCSS mentions the possibility of charging the coercing spouse, although they see this as being difficult.

81. [1985] 1 S.C.R. 295.

nized in terms of a sexual hierarchy with women on the bottom.”⁸² The test laid out in *Andrews* is still the leading test for s. 15 claims:

[D]iscrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members.⁸³

5.2 Systemic Discrimination?

While demonstrating a commitment for substantive equality, the *Andrew's* test also introduces and paves the second unresolved issue for s. 15, namely systemic discrimination. This discrimination is unique in that it may lack intent, an element the American courts have held to be essential to a discrimination complaint.⁸⁴ As well, the focus in systemic discrimination is on the adverse effect on the group, rather than on the relative treatment of the majority and minority group. The definition in *Andrews* adopts such an effects-based analysis and discards the notion of intention. This is not only significant for widening the scope of the guarantee, but also because it allows for more flexible, affirmative remedies such as “reforming an unconstitutional provision to secure equality of outcomes or implementing special measures to alleviate the disadvantage it causes or exacerbates.”⁸⁵

The argument that s. 15 should be read to encompass this type of discrimination is strengthened by its explicit recognition in the *Ontario Human Rights Code*, and by Supreme Court decisions in this forum. In *Janzen v. Platy Enterprises*,⁸⁶ an employer was found liable for discrimination because of his failure to stop sexual harassment from occurring at his workplace. He himself played no part in the harassment, nor was there any finding of an intention to discriminate. The Court took a contextual approach in deciding that sexual harassment constituted

82. K. E. Mahoney, “The Constitutional Law of Equality in Canada” (1992) 44 *Maine L.R.* 229 at 249. See generally G. Brodsky, “New challenges for the equality rights movement in Canada: the rights critics” (Paper presented to the University of Toronto’s Feminism and the Law Workshop, 1994) [unpublished]

83. *Andrews, supra*, note 77 at 151.

84. See, for example, *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979) in which the court rejected the idea that a neutral law could be found unconstitutional solely on the basis of its adverse impact on women. The court found it was necessary to show that the rule was enacted *for the purpose* of discriminating against women.

85. Mahoney, *supra*, note 78 at 247.

86. [1989] 1 S.C.R. 1252.

sex discrimination, looking at the social and economic realities of women, the gender structures in the workforce, and the disparate impact that sexual harassment had on women as a group.

5.3 *The Welfare Context*

Kathleen Mahoney sees the *Janzen* decision as a recognition that "sexual harassment cannot be separated from the unequal relations of sexual interaction that disadvantages women." This approach is equally applicable to the social assistance context.⁸⁷ The practices and policies surrounding the investigation and prosecution of welfare fraud have a disproportionate impact not only upon women, but upon a particularly vulnerable group of women owing to their low socio-economic status. As we have seen, these practices and policies both reflect and perpetuate women's inequality in society by adopting an ideology which emphasizes women's dependence on men.

In fact Collin and Hemmons argue that even in the American context, where intention is required to prove discrimination:

... the disproportionate prosecution of alleged AFDC "fraud" over and above other types of welfare deceptions is far beyond that of any legitimate state interest in maintaining the public's worth. ... the type of unreasonable distinctions where the burden falls chiefly upon racial minorities and women as a result of intentional state manipulations and malicious prosecutions ... should be an *ipso facto* violation of the equal protection clause. Such irrational discrimination is an unconscionable abuse of prosecutorial and governmental discretion.⁸⁸

5.4 *Discriminatory Practices and Policies*

5.4.1 *Targeting and The Investigation*

The new Enhanced Verification initiative has a disproportionate impact on women in a variety of ways. The most egregious practice is the Priority Verification system, which effectively targets single mothers for investigation. Of the 6 factors deemed to indicate a "high risk" file,⁸⁹ three will almost invariably affect single mothers: the presence of an older child in the house, the

87. Mahoney, *supra*, note 78 at 253.

88. Collin & Hemmons, *supra*, note 39 at 33. See also A. Eppler, "Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?" (1986) 95 Yale L.J. 788 for an interesting analysis of an Equal Protection claim against police practices relating to battered women. At 803 she suggests that "proof of stereotypic and prejudicial motivations, rather than proof of an explicit goal of disadvantaging a protected group" is adequate for a violation.

89. *Supra*, note 39 at 32.

use of 70% of disposable income for shelter (this is extremely common, especially among women who need to accommodate children) and earning over \$1000 a month (many women must seek part-time work as a supplement to their benefits to support their children). Given that only two of the factors are necessary, single mothers are almost guaranteed a place on the list.⁹⁰

The initiative also singles women out by focusing on the issue of cohabitation, requiring new staff to verify the living arrangements of families and by increasing pressure on women to pursue support payments from the father of their child.⁹¹ As argued above, the regulation of cohabitation and spousal support is directly premised on stereotypical and inequitable views of women.⁹²

Another possible challenge in the context of the investigation process could be to the methods of investigating themselves. In the case of women, these investigations are often highly intrusive owing to the fact that often investigators are trying to determine whether there is a concealed "spousal" relationship. Therefore, women are more frequently subjected to a highly invasive form of moral and sexual regulation that is premised on ideologies which promote gender inequality. Beyond the intrusive nature of the investigations, there are also concerns about the use of misogynistic and abusive tactics.⁹³

5.4.2 Prosecutorial Discretion – "Reasonable Prospect of Success"

We have already seen that there is an enormous amount of discretion as to whether to proceed with a prosecution of welfare fraud. As well, it is clear that negative attitudes toward the offence and the offenders permeate our culture and no doubt affect those making these prosecutorial decisions. Susan Wain is critical of the "weak" drafting of the social assistance acts, which allows most of the rules to be changed from the "ground up" through regulations and policies rather than through a democratic process. She argues that such "unfettered discretion precludes rules and rules are indispensable in order to provide equal treatment. In the absence of rules, there can be neither rights nor duties."⁹⁴

Although Crown Attorneys do purport to follow strict policies in deciding whether to proceed with a charge, it has already been noted that the "public

90. See "Review", *supra*, note 28 at 21.

91. *Briefing Package #1*, *supra*, note 30 at 1.

92. See Cook, *supra*, note 35 at 129-131 for an examination of the targeting method for welfare fraud investigations and women.

93. See, for example Cook, *ibid.* at 132; Wilkie, *supra*, note 14 at 72-3; Hasson, *supra*, note 18 at 146-7; Morrison *supra*, note 16 at A-3; Varma, *supra*, note 12 at 10-12.

94. Social Assistance Committee Report, *Transitions, The Impact of the Charter of Rights on Social Assistance* (Background Paper) by S. Wain (May 1987) at 19.

interest" element leaves room for the influence of many subjective factors. In his article on prosecutorial discretion, Andrew Ashworth points out the difficulty of balancing all of these factors, especially given the inherent contradictions between some or them, for example, administrative convenience and law enforcement.⁹⁵

While the "reasonable prospect of success" rule, discussed above, would appear to be completely neutral, an adverse impact analysis does not require an intention to discriminate. Thus, the rule can be said to have a disproportionate impact given the fact that women are more likely to be investigated in the first place, and so the rule serves to perpetuate this original discrimination. The "neutral" face of this rule is further unmasked if the "reasonable prospect of success" is owing to abusive and coercive investigations of women. If, as Dee Cook argues, investigation policies rest on the assumption that single women are more easily intimidated,⁹⁶ then Crown policies relying on these techniques discriminate against women.

5.4.3 What Happened to the "Spouse" in the House?

Despite the fact that cohabitation fraud invariably involves two people, the spouse charged in this situation is almost always the woman.⁹⁷ This is so even when there is clear evidence of coercion and abuse. Although Crown Attorney David L. Mackenzie denies that there is any policy governing this issue, the absence of charges against the "spouse" in such cases as *Lalonde* is highly suspect. Again, if the reason for not pressing charges against the "spouse" is owing to the fact that there is no reasonable prospect of success, this is still no answer to the fact that there is a disproportionate impact on women when it comes to this type of fraud. If, however, underlying this pattern is the fact that women often plead guilty to have the charges dropped against their male partner,⁹⁸ then a discrimination challenge is strengthened, especially if these pleas arise from views that women are easier to pressure into a plea, or if the spouse coerces her to do so.

The difficulty in asserting a challenge to this practice, however, is the nature of the remedy. It would not benefit women to argue that more men should be

95. A. Ashworth, "The 'Public Interest' Element in Prosecutions" [1987] Crim L.R. 595. In this article, Ashworth calls for greater accountability in the use of discretion, perhaps through the provision of written reasons for decisions.

96. Cook, *supra*, note 35 at 35.

97. See Martin, *supra*, note 4 at 89-91.

98. Martin, *supra*, note 4 documents a case in which this occurred, at 91. Advocates claim that this is not an uncommon occurrence.

prosecuted so as to make the impact equal. This is where a contextual analysis, like that found in *Janzen* above, may allow the court to be creative and flexible with its remedy. If the courts are willing to recognize the particularly intrusive nature of, and the inequities and assumptions underlying, this type of welfare fraud, they could well find that the practice of proceeding criminally against cohabitation fraud is in itself discriminatory, and order that these matters should be dealt with administratively. If they are not willing to go so far, they could order that criminal prosecutions not occur where evidence of coercion and domestic violence arise, following the reasoning in *Lalonde*. In any case, a declaration by the court that such practices are discriminatory may have a strong symbolic effect, and could help to change public perceptions as well as official attitudes.

5.4.4 Pleas and Sentencing

There is a strong argument to be made that the principle of general deterrence, resulting in a general rule of imprisonment for welfare fraud offences, disproportionately impacts upon women. This is not only because of the greater amounts of women being prosecuted but also because women make up the majority of caregivers in our society, and imprisonment will have a harsher impact upon their dependents and themselves as a consequence of being unable to care for them. Advocates claim that the threat of taking children out of the home if a woman is sentenced to a term of imprisonment frequently induces women to take early guilty pleas regardless of their chances of success at trial. Furthermore, the high probability that most women commit fraud out of "need" rather than greed, as a means to support their family, casts strong doubts on the effectiveness of general deterrence with respect to this form of crime on women, as opposed to men who may commit fraud for other reasons.⁹⁹

6. CONCLUSION

The "crack-down" on welfare fraud has significant repercussions for women. As we have seen, the ways in which fraud is defined, investigated and prosecuted are by no means ideologically neutral. Rather they embrace and recreate traditional stereotypes about women and their proper role in society. Although this can be said of many social systems in Canada, the increased use of criminal sanctions, resulting in terms of imprisonment and criminal records, makes this form of social control particularly harmful and destructive, and should be challenged. While this paper has not performed an in-depth constitutional analysis to determine the exact form or procedure by which such a challenge

99. See Varma, *supra*, note 12 at 12-14 for a good synopsis of the various theories of why fraud occurs.

could be launched, it has attempted to place the welfare fraud system in a context that exposes possible areas that could be addressed, and possible methods of doing so. Such a challenge is imperative if the law is to become more equitable, and reflective of the roles that women choose for themselves as opposed to the roles that society chooses for them.